Employee Recruitment by Design or Default: Uncertainty Under Title VII

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I. INTRODUCTION

The employment of every new worker is the result of a two-stage process: recruitment of applicants and selection from the applicant pool. A personnel officer may evaluate only John and Jane Worker because Juan and Juanita Worker are not in the applicant pool. What active or passive acts by the company establish the applicant pool? The issue becomes particularly troublesome when Juan and Juanita Worker are members of one minority group and John and Jane Worker are members of another racial or ethnic minority group. May employers legally recruit more actively from one group than another? One federal district court recently held no.[1]

The case law under Title VII of the Civil Rights Act of 1964,[2] which prohibits discrimination in employment on the basis of race, sex, or national origin, generally has not recognized the divisibility of recruitment and selection. The case law has established that the evaluation of applicants must result in a work force that generally reflects the composition of the relevant labor market, or the employer must prove the business necessity of the excluding selection procedures.[3] Courts have assumed that the labor market comparison covers comprehensively both selection and recruitment of John, Jane, Juan or Juanita, but refinements in the concept of "relevant" labor market can make that assumption unfounded.[4]

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1. EEOC v. Chicago Miniature Lamp Works, 622 F. Supp. 1281 (N.D. Ill. 1985). Blacks were underrepresented in the company and hispanics were overrepresented because of word-of-mouth method of recruitment.

This issue has appeared in a remedial context as well. In County of Los Angeles v. Davis, 440 U.S. 625 (1979), the class of plaintiffs included both blacks and Mexican-American applicants for city firefighter positions. The district court's remedial hiring order required at least 20% of all new firefighters to be black and another 20% to be Mexican-American until the percentage of blacks and Mexican-Americans in the department was commensurate with the percentage of each group in the county. The Supreme Court notes that the district court ordered identical accelerated hiring for both blacks and Mexican-Americans notwithstanding the fact that the Mexican-American population in the county was approximately double the size of the black population. *Id.* at 630 n.2. The court of appeals rejected this procedure and ordered a relative increase in the Mexican-American hiring quota. The Supreme Court found it unnecessary to consider that issue since the case was dismissed for mootness.

2. 42 U.S.C. § 2000e-2000e-17 (1982). Title VII provides, in part, that it is an unlawful employment practice for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a) (1982).

3. Connecticut v. Teal, 457 U.S. 440, 446-47 (1982)(citing Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)).

4. *See, e.g.*, Markey v. Tenneco, 707 F.2d 172 (5th Cir. 1983). The relevant labor market was refined to reflect the weighted percentage of workers from each area of the city. The court reasoned that, *absent discriminatory recruitment practices*, the percentage of applicants from each area of the city is probative of the willingness of individuals from those areas to travel to the employer's work site. *Id.* at 173. The court then reviewed the evidence of discrimination in recruitment and found it unpersuasive. *Id.* This issue is likely to become increasingly litigated because of the trend for new jobs to be located in the suburbs rather than in the inner city areas where a disproportionately large number of blacks reside. *See also A Nation Apart*, U.S. NEWS & WORLD REPORT, March 17, 1986, at 20.

Several cases have noted that a word-of-mouth method of recruiting applicants through existing employees can have a disparate impact[5] on minorities when the work force is predominantly white.[6] The word-of-mouth recruitment in those cases is used merely to corroborate other evidence of exclusion, however, and is not clearly characterized as a violation of the Act by itself.[7] In some cases posing recruitment problems, courts have failed to squarely address the issue.[8] Most recently the Ninth Circuit has struggled with the lack of clear precedent for the analysis of recruitment methods.[9] In one opinion, the court expressed uncertainty about whether to use disparate treatment or disparate impact analysis for recruitment practices. Because intentional discrimination was found in the first of the cases, it was unnecessary to resolve the issue.[10] Subsequently, another panel of the Court of Appeals for the Ninth Circuit held that intentional discrimination must be proven for all cases challenging practices and policies that lack well-defined criteria.[11] Included in that category was word-of-mouth recruitment. Other types of recruitment practices were not mentioned.[12] That opinion was then vacated and reheard en banc.[13]

Several questions in this area remain unanswered. Are all methods of recruitment employment "practices" covered by Title VII? Which practices, if any, may be subject to disparate impact analysis? Is racially conscious recruitment prohibited

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5. Title VII claims based upon "disparate impact" should be distinguished from claims of "unequal treatment," which is also called "disparate treatment." The similarity in the names of these dissimilar theories of recovery under Title VII is the unfortunate result of haphazard nomenclature. Neither of these terms is defined by, nor even appears in, the Act itself. "Disparate treatment" has been used to mean an employer's unequal policy or practice which differentiates between two groups solely on the basis of race, color, religion, sex, or national origin. A disparate treatment claim requires proof of the employer's discriminatory motive, although sometimes motive can be inferred from the facts showing inequality in treatment. On the other hand, "disparate impact" refers to discriminatory results of neutral practices regardless of the employer's motive. The phrases "disparate impact," "adverse impact," and "disproportionate exclusion" are used interchangeably. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971). *See also* Wright v. National Archives and Records Serv., 609 F.2d 702 (4th Cir. 1979).

6. *See, e.g.*, EEOC v. American Nat'l Bank, 652 F.2d 1176 (4th Cir. 1981), *cert. denied*, 459 U.S. 923 (1982); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 271–72 (10th Cir. 1975); Gresham v. Chambers, 501 F.2d 687 (2d Cir. 1974); United States v. Georgia Power Co., 474 F.2d 906, 925–26 (5th Cir. 1973); Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 427 (8th Cir. 1970). *But cf.* Wilkens v. University of Houston, 654 F.2d 388, 399–400 (5th Cir. 1981) (word-of-mouth recruiting not as harmful to women for academic job as it was for blue collar black workers in *Georgia Power*).

7. *See* Diggs v. Western Elec. Co., 587 F.2d 1070, 1072 (10th Cir. 1978). The Tenth Circuit found that a racially balanced work force eliminated any adverse inference which might arise from word-of-mouth recruiting. The case involved an individual claim of intentional discrimination in hiring, and did not present an opportunity for thoughtful analysis of word-of-mouth recruiting practices. It is unclear why the court thought that the balanced work force eliminated the adverse inference from the recruitment. The court could have made its comment on three different bases: (1) the court may have erroneously believed before *Teal*, 457 U.S. 440 (1982), that a good bottom line was a defense; (2) the court may have concluded from the general evidence that there was no disparate impact; or (3) the court may simply have concluded that the good bottom line effectively dispelled the inference that the employer had intentionally discriminated.

8. See discussion of Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) at text accompanying notes 55–67 *infra*.

9. Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985); Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir.), *modified*, 742 F.2d 521 (9th Cir. 1984).

10. *See* Domingo v. New England Fish Co., 727 F.2d 1429, 1435 (9th Cir. 1984).

11. Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985).

12. *Id.* at 1133. The court did clarify that nepotism allegations are proper for disparate impact analysis.

13. 787 F.2d 462 (9th Cir. 1986). After this Article went to press, the Ninth Circuit issued an opinion, reported at 810 F.2d 1477, that reverses the prior decision. *Atonio* now holds that subjective criteria may be subject to disparate impact analysis if the plaintiff can establish the causal connection between the impact and the practice. The application of the causal connection requirement to restrictive recruitment practices effectively establishes a "bottom line defense" which this Article criticizes. *See infra* text accompanying notes 95–99.

except under a bona fide affirmative action plan?[14] Can a plaintiff establish a prima facie case by showing that an employer recruits in a manner that disproportionately excludes a group protected by the Act, but that the employer nonetheless has a work force representative of the composition of the relevant labor market? If recruitment methods are indeed employment practices within the meaning of the Act, what defenses are available to employers?[15]

The answers to these questions may affect existing recruitment practices. One employer, a television station, requires all applicants to be from a formerly affiliated radio station.[16] Another company requires all applicants to be known personally to the hiring supervisor.[17] Others recruit from selected colleges.[18] Some engage in no active recruitment but simply accept walk-in applications and fill positions as they occur. Some employers do not consider applications from walk-ins unless there is a current vacancy. This timing requirement is often unknown to applicants, who reasonably believe that they have filed an active application that will be considered when a vacancy occurs.[19]

This Article examines the types of cases involving recruitment issues and proposes a model for analyzing recruitment practices. The model distinguishes between restrictive recruitment practices, such as admitting applicants from a single source or requiring applications at a single time, and open recruitment practices, where an employer is willing to accept and consider all applications. Restrictive practices are those where the source of the application becomes virtually an employment requirement; the application is not considered unless it comes from an acceptable source or at an acceptable time. Thus, they should be treated by the same legal standards as selection requirements.

This Article concludes that open recruitment from multiple sources should not be a violation of the Act in itself, even when one of the components, such as word-of-mouth recruitment, has an adverse impact on a group protected by the Act. Absent a showing that the employer intended to exclude with such a component, open recruitment practices should be merged with selection procedures for determining whether there has been a violation of the Act. Conversely, restrictive recruitment practices are separate objective employment practices that should violate Title VII if there is an adverse impact, unless the employer can justify the practice with business necessity. The bottom line defense should not be available for recruitment practices, as it is not for selection practices.[20] The defense of business necessity, however, should be viewed more liberally for recruitment practices than for selection practices.

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14. The Supreme Court held in United Steelworkers of Am. v. Weber, 443 U.S. 192 (1979) that a bona fide affirmative action plan does not violate the Act.

15. The Supreme Court created the business necessity defense for disparate impact hiring cases. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

16. *See infra* discussion of EEOC v. New York Times Broadcasting Serv., Inc., 542 F.2d 356 (6th Cir. 1976), at text accompanying notes 87–88.

17. *See infra* discussion of Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978), at notes 55–67 and accompanying text.

18. *See, e.g.*, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977).

19. *See infra* text accompanying notes 93–94.

20. Connecticut v. Teal, 457 U.S. 440, 442–46 (1982).

A large percentage increase in the cost of processing applicants should be sufficient to establish the business necessity defense.[21] The goal of employment discrimination law is to eliminate unjustified barriers, but small gains in application opportunity do not merit unlimited cost.

II. Problems with Recruitment Practices

A. *Recruitment Divisible from Hiring Practices*

Consider a hypothetical employer,[22] Standard Company, located in a predominantly black neighborhood in an inner city with substantial black and hispanic populations. Standard refuses to take walk-in applications. Instead, Standard engages in active recruitment for entry level jobs at high schools in the white suburbs. Standard also recruits, pursuant to an affirmative action plan, in selected city high schools. Recent applicants and hirees reflect the racial composition of the metropolitan area. Is Standard immune from Title VII liability? If walk-in applications were allowed, blacks in the immediately surrounding neighborhood might well apply in numbers greater than their representation in the metropolitan area.[23]

Standard would have an incentive under current law not to accept walk-in applications if Standard feared that such applicants would be both disproportionately black and less qualified than the workers recruited at the selected high schools. Wholly aside from racial animus or racial goodwill, Standard would want to avoid the imbalance caused by too many rejected minority applicants. An employer today who wishes to minimize the chance of a discrimination lawsuit will seek to have an applicant flow that shows the same rate of selection for all groups[24] and to have a work force that mirrors the composition of the metropolitan area.[25] Thus, under current law, Standard presumably can recruit and hire from selected high schools, a surreptitious method of imposing a diploma requirement, without fear that it will have to prove in court the job relatedness of such a procedure.

Assume that Potter, a black who lives near hypothetical Standard, walked into the company and asked for an application. The receptionist politely responded that no applications were being taken. With persistence, Potter finally saw the personnel manager. Potter said that he had dropped out of high school and wanted a job, perhaps as a janitor. The officer, well briefed by counsel, said nothing about the desirability of a high school diploma and simply responded that applications were not

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21. *See infra* text accompanying notes 110–113.

22. For cases that are factually related to this hypothetical, see Aguilera v. Cook County Merit Bd., 21 Fair Empl. Prac. Cas. (BNA) 731 (N.D. Ill. 1979), *rev'd and remanded*, 661 F.2d 937 (7th Cir. 1981), *dismissed*, 582 F. Supp. 1053 (N.D. Ill. 1984).

23. For a case in which the percentage of blacks among applicants was substantially greater than black representation in the Standard Metropolitan Statistical Area (SMSA), see Davis v. City of Dallas, 483 F. Supp. 54, 57 (N.D. Tex. 1979), *motion to reconsider denied with opinion*, 487 F. Supp. 389 (N.D. Tex. 1980).

24. The Federal Uniform Guidelines on Employee Selection Procedures, 41 C.F.R. § 60-3.4(D) (1980), rely upon applicant flow to evaluate the impact of hiring requirements.

25. *See* International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977). In that case, the Supreme Court first articulated the principle that the work force of a nondiscriminating employer is expected over time to more or less reflect the community from which employees are drawn.

being taken. Potter learned shortly after this encounter that a number of new janitors without prior experience were hired at Standard after his inquiry. They were recruited from selected high schools. Potter wants to sue.

Potter has no individual claim of disparate treatment because he did not *apply* for the job, and application is the crucial first step of proof.[26] Potter also has no claim of intentional unequal treatment of a group defined by race because the facts indicate that the rule prohibiting walk-in applications is applied equally to all groups.[27] The practice is facially neutral and must therefore be challenged by disparate impact analysis.

Potter will not succeed with a disparate impact claim challenging the overall selection process[28] unless he can convince the court either (1) that the relevant geographic market for Standard is not the metropolitan area from which employees are actually drawn, but should be more heavily weighted to reflect the surrounding black neighborhood, or (2) that Standard is really using a high school diploma requirement. Both arguments are difficult and likely to fail. The first is based upon the concept of a weighted relevant market, for which there is some precedent.[29] The cases to date, however, have all dealt with weighting the market to reflect the geographic area from which current employees commute. Potter's theory would reverse the argument: the recruitment practices have distorted the work force so that the local labor market provides a more accurate comparison than the area from which employees are actually drawn. This approach attacks the recruitment practice itself, an argument for which there is no direct precedent.

Potter's second theory is that Standard's practices are a subterfuge for a high school diploma requirement. Following the test established by the landmark Supreme Court decision in *Griggs v. Duke Power Co.*,[30] Potter would introduce evidence that

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26. Disparate treatment claims are based upon a showing of intentional exclusion, whereas disparate impact claims are premised upon the disproportionate exclusion of the plaintiff's group. *See supra* note 5. The requirements for an individual claim of disparate treatment were explained by the Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Those plaintiff requirements are:

> (i) that plaintiff belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. Once the plaintiff has established these elements, the burden shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* The reference to membership in a racial minority in these requirements is not restrictive. *See, e.g.*, Kamberos v. GTE Automatic Elec., Inc., 603 F.2d 598 (7th Cir. 1979) (sex discrimination application of *McDonnell Douglas* criteria), *cert. denied*, 454 U.S. 1060 (1981); Lujan v. New Mexico Health and Social Services Dept., 624 F.2d 968 (10th Cir. 1980) (national origin discrimination application of *McDonnell Douglas* criteria).

27. Group unequal treatment is a violation of the Act because an employer uses different procedures or rules for groups defined by race, sex, or ethnicity. *See, e.g.*, Slack v. Havens, 522 F.2d 1091 (9th Cir. 1975) (black women workers forced to do heavy cleaning beyond normal job duties, whereas white coworker was excused from the heavy cleaning assignment).

28. The Supreme Court introduced the disparate impact method of comparing the population to the workforce in International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) and in Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). For an explanation of the various methods for proving disparate impact, see Shoben, *Probing the Discriminatory Effects of Employee Selection Procedures with Disparate Impact Analysis Under Title VII*, 56 TEX. L. REV. 1 (1977).

29. Clark v. Chrysler Corp., 673 F.2d 921, 929 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982); Markey v. Tenneco Oil Co., 635 F.2d 497, 499–500 (5th Cir. 1981).

30. 401 U.S. 424 (1971).

the education requirement has a disparate impact on blacks. The problem with this approach is that the company does not have an announced high school diploma requirement. Potter's argument is that the company is imposing an education requirement surreptitiously through its recruitment method. This theory of subterfuge is premised upon proof of intentional discrimination,[31] which would be difficult. Thus, unless Potter can attack the impact of the recruitment practice itself, he is unlikely to establish a claim.

Consider another hypothetical plaintiff,[32] Palmer, a woman who seeks employment as an airline pilot. She contacts Skytrans which, like many airlines, has minimum height and experience requirements. Assume that Palmer herself meets these requirements, although they have a disparate impact on women in general so that there are very few women pilots. Palmer is unsuccessful in obtaining employment because Skytrans does not keep applications active when there are no vacancies.[33] When a vacancy occurs, Skytrans considers only current applicants. Word-of-mouth and occasional advertising notifies potential applicants. Palmer never learns of a vacancy in time to apply for it. She believes that other qualified women have the same problem with Skytrans because there are almost no women pilots in the company.

Palmer wants to bring a Title VII suit against Skytrans. Under current law she does not have a good claim under either disparate treatment or disparate impact theories. Her disparate treatment claim will fail for lack of a vacancy at each time she applied.[34] Her disparate impact claim will fail for a number of reasons. First, she lacks standing to challenge the specific height and experience requirements that disproportionately exclude women.[35] Moreover, there is precedent for the job-relatedness of those requirements.[36] Second, she will have difficulty challenging the overall hiring process by the population comparison method. Following the analysis of the decision in *Hazelwood School District v. United States*,[37] she would compare the employer's work force with the relevant labor market. Again she has no claim because the relevant labor market will be restricted to qualified pilots. The underrepresentation of women among qualified pilots will explain the small number of women in Skytrans' work force.[38] Palmer does not have a claim unless the recruitment practice itself is subject to the Act.

If recruitment practices are subject to the Act, can both disparate treatment and disparate impact theories be used? Must Palmer attack the Skytrans method by

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31. *Cf.* Atonio v. Wards Cove Packing Co., 768 F.2d 1120 (9th Cir. 1985). *See supra* note 13.

32. For cases factually related to this hypothetical case, see Gay v. Waiters' and Dairy Lunchmen's Union, 694 F.2d 531 (9th Cir. 1982); EEOC v. High Top Coal Co., 508 F. Supp. 553 (E.D. Tenn. 1980), *aff'd*, 677 F.2d 1136 (6th Cir. 1982). *See also* Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1127 n.3 (9th Cir. 1985).

33. *Cf.* Lowe v. City of Montovia, 755 F.2d 998 (9th Cir. 1986) (delayed eligibility lists that expire automatically after period of time).

34. *See supra* note 26.

35. *See generally* B. SCHLEI AND P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW, 986–91 (2d ed. 1976).

36. *See* Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 53–54 (8th Cir. 1977) (height requirement for pilots upheld); Spurlock v. United Airlines, Inc., 475 F.2d 216, 218–19 (10th Cir. 1972) (experience requirement for pilots upheld).

37. 433 U.S. 299 (1977). *See supra* note 28.

38. *See* Boyd v. Ozark Air Lines, Inc., 568 F.2d 50, 53–54 (8th Cir. 1977).

showing that the company adopted it for the purpose of excluding women? Or is it sufficient for her to show that the practice disproportionately excludes qualified women?

This question was noted, but not decided, in a Ninth Circuit case, *Domingo v. New England Fish Co.*[39] The plaintiff charged the defendant, known as Nefco, with race discrimination against Filipinos. Nefco operates seasonal salmon canneries in remote areas of Alaska. It hires employees from Washington, Oregon, and northern California and transports them to the canneries. They are housed and fed there for the canning season. Domingo brought class claims of discrimination against Nefco on several grounds, one of which was the company's method of recruitment. Workers for the lower-paying jobs were recruited from the native villages of Alaska and from a predominantly Filipino union local in Seattle. The better jobs, held primarily by whites, were filled by word-of-mouth recruiting. This division in the work force was further perpetuated by nepotism and by the broad hiring discretion given to the supervisors, most of whom were white. The court expressed uncertainty whether these recruitment and hiring practices could be subjected to disparate impact analysis, because the practices were not facially neutral. The issue was not resolved, however, because the plaintiffs had established intentional discrimination.[40]

Some of the questions left open by *Domingo* surfaced in a case that was originally a *Domingo* companion case, *Atonio v. Wards Cove Packing Co.*[41] *Atonio* was another class action by nonwhites suing other salmon canneries in Alaska. Factually the cases were very similar. The crucial legal difference between them is that the class in *Domingo* successfully proved intentional discrimination against nonwhites, but the *Atonio* plaintiffs failed to do so.[42] The district court found that there was not sufficient proof that the *Atonio* defendants had intentionally excluded or disadvantaged nonwhites through a variety of challenged practices, including word-of-mouth recruitment. The *Atonio* plaintiffs then argued that the practices should be analyzed under the disparate impact model. The district court refused to apply disparate impact analysis to the hiring practices, except for the claims of nepotism. The Ninth Circuit initially upheld this decision and ruled that disparate impact analysis is appropriate only for facially neutral employment requirements. Other practices and policies, including word-of-mouth recruitment, the panel said, can be scrutinized for intentional discrimination but not evaluated for their disparate impact.[43] That opinion was vacated and new arguments have been heard en banc.

Regardless of the wisdom of limiting disparate impact analysis to facially neutral practices,[44] doing so leaves unresolved the question of whether recruitment practices

39. 727 F.2d 1429 (9th Cir.), *modified*, 742 F.2d 521 (9th Cir.).

40. *Id.* at 1435.

41. 768 F.2d 1120 (9th Cir. 1985). *See supra* note 13.

42. *Id.* at 1125–26.

43. *Id.* at 1133.

44. The courts of appeals are split on this question. Disparate impact analysis has been applied to subjective criteria in hiring by the Sixth, Eleventh, and D.C. Circuits. *See* Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985); Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984); Rowe v. Cleveland Pneumatic Co., Numerical Control, 690 F.2d 88 (6th Cir. 1982). The Fourth, Fifth, and Eighth Circuits have not applied disparate impact analysis to subjective criteria. *See* Vuyanich v.

can ever be considered facially neutral practices. The withdrawn *Atonio* opinion said that practices such as hiring from different sources or channels and word-of-mouth recruitment were not facially neutral practices and therefore not suited for disparate impact analysis. The panel did not define "facially neutral practices," but stated: "Examples of the type of objective, outwardly neutral employment practices clearly susceptible to impact scrutiny are pre-employment tests that adversely affect people of certain cultural backgrounds and pre-selection requirements such as height and weight restrictions."[45] These examples reflect two of the major Supreme Court cases that employed disparate impact analysis,[46] but this restrictive view neglects to note that the Supreme Court has also employed disparate impact analysis to make a comparison of the employer's work force (or recent hirees) to the surrounding population (or labor force).[47] Such comparisons encompass collectively all the kinds of practices that the *Atonio* panel found unsuitable for individual scrutiny by disparate impact analysis: hiring from different sources, word-of-mouth recruitment, lack of well-defined hiring criteria and subjective decision making.[48]

If individual components of the hiring process are not subject to disparate impact analysis unless they are "facially neutral practices,"[49] then the courts must develop criteria for determining whether a practice is in the facially neutral category. Are only objective selection procedures in the category? The panel in *Atonio* offered examples of such practices but limited them to selection devices.[50] Why not include in the facially neutral category recruitment practices such as a limitation on the sources of applicants, a refusal to accept walk-in applications, or a limitation on the time of application? If these practices are not individually subject to disparate impact analysis, then they will be analyzed collectively with selection procedures for disparate impact under the population comparison approach.[51] Plaintiffs such as the hypothetical ones in *Potter v. Standard*[52] and *Palmer v. Skytrans*[53] would be unable to establish a violation of Title VII unless they can prove intentional discrimination. *Atonio* explained that the value of disparate impact analysis for facially neutral

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Republic Nat'l Bank of Dallas, 723 F.2d 1195 (5th Cir.), *cert. denied*, 469 U.S. 1073 (1984); EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983); Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983); Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983); Talley v. United States Postal Serv., 720 F.2d 505 (8th Cir. 1983); Pope v. City of Hickory, N.C., 679 F.2d 20 (4th Cir. 1982); Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982); Harris v. Ford Motor Co., 651 F.2d 609 (8th Cir. 1981). The Tenth Circuit has applied disparate impact analysis in some cases and not applied it in others. *See* Lasso v. Woodmen of World Life Ins. Co., 741 F.2d 1241 (10th Cir. 1984) (applying the analysis); Mortensen v. Callaway, 672 F.2d 822 (10th Cir. 1982) (not applying the analysis); Williams v. Colorado Springs, Colo. School Dist., 641 F.2d 835 (10th Cir. 1981) (applying the analysis). The First Circuit has twice noted the split and left the issue unresolved. *See* Latino Unidos v. Secretary of HUD, 799 F.2d 774 (1st Cir. 1986); Robinson v. Polaroid Corp., 732 F.2d 1010 (1st Cir. 1984).

45. Atonio v. Wards Cove Packing Co., 768 F.2d 1120, 1131 (9th Cir. 1985).

46. Griggs v. Duke Power Co., 401 U.S. 424 (1971) (ability tests); Dothard v. Rawlinson, 433 U.S. 321 (1977) (height requirement).

47. Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).

48. 768 F.2d 1120, 1133 (9th Cir. 1985). *See supra* note 13.

49. The Circuits are split on this issue. *See supra* note 44. The Supreme Court has made an oblique footnote reference to the issue. *See infra* note 63.

50. *See supra* note 45 and accompanying text.

51. *See supra* note 47.

52. *See supra* text accompanying notes 22–31.

53. *See supra* text accompanying notes 32–38.

practices is to attack exclusionary procedures that "by their nature make intentional discrimination difficult or impossible to prove."[54] Restrictive recruitment practices have the same character. Unless they are justified by business necessity, their disproportionate impact on the basis of race, sex, or ethnicity should violate Title VII.

B. *The Recruitment Problem in* Furnco

The 1978 Supreme Court case *Furnco Construction Co. v. Waters*[55] best illustrates the importance of distinguishing between recruitment practices and selection procedures and the value of disparate impact analysis for some recruitment practices. Regrettably, the case was decided on other grounds. The case concerned the claim of intentional discrimination in hiring, and the Court remanded it for proper application of the *McDonnell Douglas v. Green* burdens.[56] Had the case been remanded for disparate impact evidence, as the dissenting justices urged,[57] this area of Title VII law might have been significantly clarified.

Furnco concerned an employer that specialized in relining blast furnaces in steel mills. This construction company did not maintain a permanent work force, but hired workers for individual contracts until each job was completed. The job superintendent for each contract was responsible for hiring.[58]

The job that became the object of this lawsuit was to reline with firebrick a blast furnace for Interlake, Inc. Furnco's job superintendent hired bricklayers primarily from the group of workers known to him personally—a predominantly white group. There was also supplemental hiring of a few individuals based on management recommendations. Most notably, this included black bricklayers hired pursuant to Furnco's affirmative action plan. As a result, the racial composition of the work force for the Interlake job closely reflected the racial composition of the relevant labor market. The plaintiffs were black bricklayers who were experienced and otherwise qualified for the job. They were not hired because they were not known personally to the superintendent nor were they part of the supplemental hiring for the affirmative action plan. They applied "at the gate" and were rejected on the grounds that Furnco did not accept job-site applications.[59]

Furnco's refusal to take applications at the job site is a recruitment restriction. Recruitment practices can be either open or restrictive. Open recruiting includes actively seeking applications through activities such as advertising, contacting public or private employment agencies, or visiting schools. It also includes passive acceptance of applications as they are received. A restrictive recruitment practice, on the other hand, is a refusal to accept applications from some sources in favor of one or more exclusive sources. The challenged practice in *Furnco* was the refusal to take

54. 768 F.2d 1120, 1133 (9th Cir. 1985).
55. 438 U.S. 567 (1978).
56. *Id.* at 576–80. *See supra* note 26 for an explanation of the *McDonnell Douglas* criteria.
57. Justice Marshall, joined by Justice Brennan, concurred in part and dissented in part. 438 U.S. 567, 581 (1978).
58. 438 U.S. 567, 569–70 (1978).
59. *Id.* at 570.

applications at the gate—a restrictive practice—in favor of applicants known by or referred to the superintendent.

For most employers, the recruitment process is a haphazard collection of open practices,[60] often augmented by specific efforts such as an affirmative action program. All the parts taken together make a hodge-podge whole: walk-ins, word-of-mouth referrals, advertising respondents, referrals from employment agencies, and so forth. If each were to be examined individually for any adverse impact on groups defined by race, sex, or national origin, probably many would not pass scrutiny. The effect of any one practice, however, is not determinative of the applicant pool. It is the whole that is important.

Restrictive recruitment practices are distinguishable. When an employer refuses to consider an application because of its source, then the recruitment practice amounts to a job requirement. It is as much a requirement as an education requirement or a test because the applicant is rejected for failure to meet an identifiable criterion—source of application. Consequently, a restrictive recruitment practice ought to be subject to disparate impact analysis. It should be an unlawful employment practice if disparate impact is shown, unless the employer can defend with a claim of business necessity.

Applying these principles to *Furnco* would require examining the restrictive practice of refusing to accept applications at the job site. If that practice has a disparate impact on blacks, then the burden should shift to Furnco to establish business necessity. If the exclusionary requirement cannot be defended, then appropriate relief would be an injunction and restitution to those identifiably injured.[61]

The *Furnco* litigation did not divide the recruitment and hiring practices. Instead, the district court considered them together and concluded there was no disparate, impact because the affirmative action plan produced an acceptable "bottom line." The Supreme Court did not address the bottom line issue in *Furnco* as it subsequently did in *Connecticut v. Teal*.[62] To the contrary, the recruitment practice was not perceived as a requirement.[63] Instead Justice Rehnquist's opinion for the majority addressed disparate treatment standards under *McDonnell Douglas v. Green*.

Under *McDonnell Douglas* analysis, a plaintiff's prima facie case requires application for an existing job and rejection despite qualification. In *Furnco* the employer conceded the plaintiffs' qualifications.[64] The defendant argued instead that

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60. For a survey of the recruitment practices of 300 personnel and industrial relations executives, see *Recruiting Policies and Practices, Personnel Policies Forum* (BNA), at 1–15 (July 1979).

61. Albemarle Paper Co. v. Moody, 422 U.S. 405, 413–25 (1975).

62. 457 U.S. 440 (1982).

63. In a footnote the majority opinion by Justice Rehnquist observes that this case did not involve employment tests, particularized requirements such as height and weight, or a pattern or practice claim. Furnco Constr. Co. v. Waters, 438 U.S. 567, 575 n.7 (1978). The suggestion is that other types of employment criteria should not be treated as disparate impact cases. In contrast, the dissenting comments of Justice Marshall, joined by Justice Brennan, repeat the original *Griggs* formulation that any facially neutral employment *practice* may be the subject of a disparate impact claim. *Id.* at 583 (Marshall, J., dissenting).

64. In a footnote the Court explains:

> We note that this case does not raise any questions regarding exactly what sort of requirements an employer can impose upon any particular job. Furnco has conceded that for all its purposes respondents were qualified in every sense. Thus, with respect to the *McDonnell Douglas* prima facie case, the only question it places at issue

the refusal to take job site applications had a legitimate business purpose; workers known to the superintendent did not do slow or shoddy work. The district court agreed with Furnco, but the Seventh Circuit reversed because the burden of accepting job site applications was slight. The Supreme Court admonished that the defendant's burden under *McDonnell Douglas* is merely to dispel the inference of intentional discrimination. The Court added that the employer "need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications."[65] The Court concluded that employers need not adopt the *best* hiring procedures in order to consider more minority applicants.

The fallacy of *Furnco* is the premise that the plaintiffs were qualified for the job. They were good bricklayers, but they were not "qualified" for the Interlake job because they did not meet the requirement of being known by or referred to the superintendent. The concept of qualification under *McDonnell Douglas* has not been defined by the Court, but surely it must encompass announced requirements. Furnco's refusal to take applications at the gate in favor of known workers was an acknowledged recruitment requirement which the plaintiffs failed to meet. When plaintiffs fail to satisfy the *McDonnell Douglas* steps, the only alternative under Title VII law is to demonstrate that the failed requirement has a disparate impact on plaintiffs' group. *Griggs* permits a challenge to practices fair on their face but discriminatory in operation. If the *Furnco* plaintiffs could show the impact of the requirement on black bricklayers, a prima facie case under *Griggs* should be found. Justice Marshall's dissent objected to the Court's apparent foreclosure of disparate impact evidence on remand.[66] Although the majority opinion is unclear on this point, the foreclosure apparently was caused by Furnco's concession that the plaintiffs were qualified.[67] Instead the recruitment rule should have been analyzed as an employment requirement.

III. Recruitment Practices as Requirements

Recruitment practices are either restricted or unrestricted. Restrictive practices are those where the source of the application plays a role in the employment decision. Single source recruiting, such as union referrals or promotion-from-within policies, is one type. Refusal to accept applicants from one source while accepting from other multiple sources is another type. The latter type of restrictive recruiting is illustrated in the hypothetical example of Standard Company's refusal to accept Potter's walk-in

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is whether its refusal to consider respondents' applications at the gate was based upon legitimate, nondiscriminatory reasons and therefore permissible.

438 U.S. 567, 576 n.8 (1979).

65. *Id.* at 577.

66. *Id.* at 583–85 (Marshall, J., dissenting).

67. The remand is unclear on this point. The majority opinion notes that the parties presented alternative theories of liability and defense not addressed by the Seventh Circuit. The Court concluded that the matters were still preserved for appeal, but were best considered first by the circuit court. *Id.* at 580–81. One of those alternative theories was discussed in an accompanying footnote. *Id.* at 580 n.9. The dissent concludes from this footnote that other theories may be foreclosed. *Id.* at 584 (Marshall, J., dissenting).

application.[68] Both types of restrictive recruitment practices are best characterized as employment requirements. They should be analyzed as objective hiring criteria. Open and unrestrictive recruitment, however, is an indivisible part of the overall hiring process. Unrestricted procedures should be analyzed as part of the total hiring case, whereas restrictive recruitment practices should be scrutinized separately and should not be defended with "bottom line" favorable results.

A. *Multiple Sources of Applicants with Unrestricted Recruiting*

Employers who engage in unrestricted recruiting typically have multiple sources of applicants.[69] Some are actively sought and others are passively received. Active recruiting is any deliberate effort to attract applicants: interviewing at schools, contacting referral agencies, and so forth. Passive recruitment is simply a willingness to accept and consider any applicant who seeks employment. A combination of active and passive recruiting is common.

Consider hypothetical Company *XYZ*, which accepts walk-in applications, urges present employees to refer friends, and conducts special minority recruiting for affirmative action. These are active and passive methods. Assume further that, although the company's work force has historically been all-white, recent hiring shows racial minority representation compares favorably with the relevant labor market.[70] A minority plaintiff then brings a Title VII action on the theory that the word-of-mouth recruiting from the predominantly white work force has a disparate impact. Under these facts the plaintiff should not have a prima facie case. Unrestricted recruiting from multiple sources cannot reasonably be divided into its components. Even if one isolated practice has a separate impact, it may be offset by another. In the absence of intentional discrimination,[71] Company *XYZ* should not be required to justify each of these practices.

The earlier hypothetical with Standard Company[72] is distinguishable. Potter's complaint was that Standard refused to accept walk-ins. Both Company *XYZ* and Standard Company have favorable bottom-line hiring figures, but Company *XYZ* engages in unrestricted recruitment whereas Standard is restrictive. Anyone may apply to Company *XYZ* but not to Standard. If Standard accepted all applications, a greater proportion of minority workers might have applied to this inner-city employer. The bottom line would then look very different.

Although the premise of this Article is that no single employment practice—either in recruitment or in selection—should be permissible under Title VII, unless the

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68. *See supra* text accompanying notes 20–29.

69. *See Recruiting Policies and Practices, supra* note 60.

70. Company *XYZ*'s applicant flow would be a good test of its hiring practices, but special recruitment efforts may result in disproportionate numbers of unqualified applicants in some groups. A comparison of recent hirees to the relevant labor market is thus more appropriate. *See generally* Wheeler v. City of Columbus, Miss., 686 F.2d 1144 (5th Cir. 1982); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981). The Supreme Court has indicated that applicant flow evidence should be accorded significant weight only in appropriate cases. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977). *See also* New York City Transit Auth. v. Beazer, 440 U.S. 568, 584–87 (1979).

71. *See* Domingo v. New England Fish Co., 727 F.2d 1429 (9th Cir. 1984).

72. *See supra* text accompanying notes 22–31.

defense of business necessity is established when the practice is exclusionary,[73] an exception to that principle is reasonable for open recruiting. Each active component of an unrestricted recruitment process, such as used by Company *XYZ*, is likely to have an adverse impact on some group when viewed in isolation. The business necessity defense is difficult to apply to open recruitment because by definition the company has no requirement to defend. As a result, the finding of adverse impact would amount to a *per se* violation of the Act. Employers could only protect themselves by abandoning active recruitment practices in favor of passive ones. In the absence of intentional discrimination, such a result is unjustified and inconsistent with the purposes of the Act.[74] It suffices to examine the unrestricted recruitment in relation to the total hiring process.

The role of recruitment in refining the relevant labor market has been noted previously. Many courts have considered recruitment evidence for fine-tuning the relevant labor market.[75] Most notably, such evidence has been used to evaluate a weighted labor market that accounts for the geographic distribution of actual employees.[76] Recruitment evidence is also relevant to rebut applicant flow. Employers have successfully argued that the effect of an aggressive affirmative action recruitment practice can cause unfavorable applicant flow data because a disproportionately high number of unqualified minority applicants may have been encouraged to apply.[77] Plaintiffs also have successfully used recruitment evidence to challenge applicant flow. A city police department, for example, accepted all applications, but conducted extensive recruitment efforts in the predominantly white suburbs. The resulting applicant pool probably contained a much larger percentage of whites than it would have had no active recruiting been undertaken.[78]

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73. *See infra* Section V for a discussion of the business necessity defense.

74. The Supreme Court has discussed the purpose of the Act on several occasions. Connecticut v. Teal, 457 U.S. 440, 446–55 (1982); United Steelworkers of Am. v. Weber, 443 U.S. 193, 201–07 (1979); Griggs v. Duke Power Co., 401 U.S 424, 429–36 (1971).

75. *See supra* note 4.

76. *See supra* note 29 and cases cited therein. The discussion of this principle by the Seventh Circuit is particularly noteworthy. In Clark v. Chrysler Corp., 673 F.2d 921 (7th Cir. 1982), the plaintiffs alleged race discrimination in recruiting and hiring. The company relied upon word-of-mouth referrals from its predominantly white work force. It also took referrals from the Henry County Indiana Employment Security Division (IESD). The plaintiffs claimed that failure to take referrals from other IESD offices in other counties with higher proportions of blacks was discriminatory. They also alleged that the eventual termination of referrals from the Henry County IESD further restricted opportunities for blacks. The Seventh Circuit upheld the district court's finding of no impact. First, the court noted that the comparison of the work force to the relevant labor market favored blacks. The court accepted a *weighted* relevant labor market that reflected the percentage of the work force drawn from each county. The court recognized the dangers of weighting the relevant labor market, but found no taint from recruitment practices. The court said that "taint" is determined by comparing the percentage of black applicants to the availability of blacks in the relevant labor market. This approach is circular; the relevant labor market is determined by whether there is taint from recruitment, and taint from recruitment is determined by the relevant labor market. In *Clark* there was no problem, however, because recent hirees exceeded availability when applying *both* the plaintiffs' and defendant's figures. The question thus left unresolved is how to choose a relevant labor market for determining if recruitment taint precludes the use of a weighted relevant labor market.

77. *See, e.g.*, Carroll v. Sears, Roebuck & Co., 708 F.2d 183 (5th Cir. 1983). The defendants argued that its effective affirmative action plan, as well as the location of its personnel office in close proximity to the State Employment Office, resulted in a disproportionate number of unqualified black applicants. *Id.* at 191 n.8. The district court concluded that these factors resulted in an artifically high number of black applicants. The court of appeals did not reach the issue because it found no impact even at unadjusted levels. *Id.* at 188.

78. League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873 (C.D. Cal. 1976). *See also* Davis v. City of Dallas, 483 F. Supp. 54 (N.D. Tex. 1979), *motion to reconsider denied with opinion*, 487 F. Supp. 389 (N.D.

In most cases involving unrestricted recruiting, the recruitment practices merge into the hiring procedure. In those cases, the usual approaches for probing hiring procedures encompass the unrestricted recruitment component as well.[79] Even though active recruiting may affect the relevant market, its effects should not make a prima facie case by themselves.

When an employer does not engage in any active recruiting but relies exclusively on unrestrictive passive acceptance of unsolicited applications, plaintiffs rarely can show any effect of recruitment on the applicant pool. A company's reputation for discrimination in the past, however, may be relevant.[80] Without the consideration of this evidence, unrestricted passive recruitment would appear never to amount to a violation of the Act regardless of its impact. Unless one posits an affirmative duty to recruit under Title VII,[81] passive recruiting presents no opportunity for exclusion except for self-exclusion. The exception might be an employer's location of the personnel office in a location other than the workplace. This type of practice should be deemed active recruiting, however, since one would expect purely passive acceptance of applications to be at the work site.

B. *Single or Limited Sources of Applicants: Restricted Recruitment*

Many employers have single or limited sources of applicants. Collective bargaining agreements, for example, often require an employer to take union referrals.[82] Another common means of limiting recruiting is promotion-from-within policies for upper level jobs.[83] These methods are restrictive in that the employer refuses to accept applications from other sources, such as walk-ins, or does not use these sources until the primary source is exhausted. The hypothetical example of Standard Company recruiting only from selected high schools falls into this category,[84] as does the *Furnco* case.[85]

Tex. 1980) (Women were actively recruited for police officer jobs, but few applied; the court concluded that applicant flow was appropriate because relatively few women were interested in police work during the relevant time period.).

79. It is noteworthy that there was a recruitment component in the Supreme Court case, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). The school district accepted all applications, but also engaged in active recruiting at colleges. One of the facts alleged to support the claim of intentional discrimination was that the school district recruited only at colleges attended primarily by whites and ignored two teachers' colleges with predominantly black enrollment. *Id.* at 303 n.4.

80. Also relevant is the adverse effect of announced exclusionary selection standards, such as height and weight requirements, on the applicant pool. *See* Dothard v. Rawlinson, 433 U.S. 321, 330 (1977); Donnell v. General Motors Corp., 576 F.2d 1292, 1298 (8th Cir. 1978), *cert. denied*, 459 U.S. 844 (1982).

81. This position was advocated in an early article. *See* Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1968).

82. *See, e.g.*, Mills v. International Bhd. of Teamsters, 634 F.2d 282, 284 (5th Cir. 1981); EEOC v. Enterprise Ass'n Steamfitters Local 638, 542 F.2d 579, 588–89 (2d Cir. 1976), *cert. denied*, 430 U.S. 911 (1977); Kaplan v. International Alliance of Theatrical and Stage Employees, Local 659, 525 F.2d 1354, 1355 (9th Cir. 1975); Gay v. Waiters' and Dairy Lunchmen's Union, Local 30, 489 F. Supp. 282, 288–89 (N.D. Cal. 1980), *aff'd*, 694 F.2d 531 (9th Cir. 1982); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329, 337–39 (E.D. Pa. 1978), *aff'd*, 648 F.2d 922 (3rd Cir. 1981), *rev'd*, 458 U.S. 375 (1982).

83. *See, e.g.*, Johnson v. Uncle Ben's, Inc., 628 F.2d 419, 425–26 (5th Cir. 1980), *vacated*, 451 U.S. 902, *modified and aff'd in part, rev'd in part*, 657 F.2d 750 (5th Cir. 1981), *cert. denied*, 459 U.S. 967 (1982); Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978), *cert. denied*, 459 U.S. 844 (1982); Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 398 (D.C. Ore. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974).

84. *See supra* text accompanying notes 22–31.

85. *See supra* text accompanying notes 55–67.

A requirement that applicants come from particular sources is an objective practice like any other hiring requirement and should be subject to the same legal analysis as other requirements. If restrictive recruiting has a disparate impact, then an employer should have the burden of establishing business necessity, just as with a height requirement or written test.[86]

A case example involving restrictive recruitment is *EEOC v. The New York Times Broadcasting Service, Inc.*[87] In that case, a woman alleged sex discrimination in the hiring of writer-reporters and announcers at WREC-TV. This television station recruited primarily from a radio station, WREC, with whom it had formerly been affiliated. Neither the radio station nor the television station had ever hired a female announcer, and only one female reporter-writer had ever been employed. The court found that the employment procedure had a disparate impact on the basis of sex. The station argued the business necessity of the prior radio broadcasting experience. The court rejected this defense because there were alternative sources of applicants with the same experience. There was nothing unique about the radio experience obtained at the restricted source, WREC radio.[88]

Single source recruiting pursuant to a collective bargaining agreement poses a slightly different problem. If the employer has committed to hire from a union list, the union becomes the hiring agent. In the Title VII context, the employer should be liable for the practices of the hiring agent. If the agent discriminates intentionally and directly on behalf of an employer, there should be liability.[89] The more difficult question is whether an employer should be accountable for union practices that have a disparate impact. Since the agreement to hire from the union is a restrictive recruitment practice, the employer should be required to show the business necessity of the exclusionary union practices. The potential joint liability of employers and unions for recruitment practices with a disparate impact should encourage greater scrutiny of those procedures. Any other result allows the employer to hide behind the practices of its agent.

An example of this problem is *Kaplan v. International Alliance of Theatrical and Stage Employees.*[90] The plaintiff was a photographer desirous of work with motion picture and television producers. The employers had collective bargaining agreements with the union representing members of theatrical and television crafts. The agreement required employers to give preference to individuals on the union's

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86. *But see supra* note 63 for discussion of the footnote in *Furnco* which suggests a limitation on practices subject to the disparate impact approach. One district court has relied on that footnote to conclude that an "as needed" hiring practice was not a practice subject to *Griggs*. EEOC v. High Top Coal Co., 508 F. Supp. 553, 556–57 (E.D. Tenn. 1981), *aff'd*, 677 F.2d 1136 (6th Cir. 1982).

87. 542 F.2d 356 (6th Cir. 1976).

88. The lack of any special character of the WREC radio experience was shown by the fact that the defendant hired successfully from other sources after the filing of the complaint. *Id.* at 361.

89. On the subject of joint union-management liability for violations of Title VII, see generally C. SULLIVAN, M. ZIMMER & R. RICHARDS, FEDERAL STATUTORY LAW OF EMPLOYMENT DISCRIMINATION 254–58 (1980) [hereinafter FEDERAL STATUTORY LAW]. *But see* EEOC v. Local 14, Int'l Union of Operating Eng'rs, 553 F.2d 251 (2d Cir. 1977) (employer contractors joined for purposes of relief only in action against union); United States v. Sheet Metal Workers Int'l Ass'n, Local 36, 416 F.2d 123 (8th Cir. 1969) (trade association of employers not liable for back pay where there was no specific finding of discrimination independent of the union's intentional discrimination).

90. 525 F.2d 1354 (9th Cir. 1975).

Industry Experience Roster. A listing on the roster was possible only through experience *and* union membership. The female plaintiff had gained experience but not union membership, and thus was not on the roster. She successfully sued the union for intentional sex discrimination under Title VII.[91] Although she did not sue any producers, they should have been liable on a disparate impact theory for the use of a single recruitment source that disproportionately excluded women.

Promotion-from-within policies are another type of single source recruiting.[92] When an employer fills upper level jobs primarily through promotions from lower level jobs, the pool of applicants for the higher job is restricted. When that pool is not representative of the composition of the relevant labor market, the policy is exclusionary. The burden should shift to the employer to show the business necessity of this restrictive recruitment policy for promotions.

C. *Prohibited Sources of Applicants*

Employers using multiple sources of applicants, but refusing to accept applications from a particular source, are also engaging in restrictive recruiting. A willingness to accept applicants who are referred from any source, but not walk-in self-referrals, is one example. The practice of the hypothetical company Skytrans described earlier is another example.[93] Skytrans accepted any applications that arrived from any source, but only at specified times. It refused to accept applications when there were no openings. This time constraint creates a prohibited source of applicants; applications made before job vacancies are excluded unless the applicant knows to reapply. This type of restrictive recruiting is another employment requirement—exact time of application—and should also be subject to disparate impact analysis. If the plaintiff demonstrates impact, the burden should shift to the employer to demonstrate the business necessity of the restricted acceptance of applications.

The plaintiff's proof of disparate impact in this category would be particularly difficult. The plaintiff who wished to challenge only the recruitment restriction rather than the entire hiring procedure would need to show that refusal to retain applications adversely affected plaintiff's group. In the Skytrans example, Palmer would need to prove that qualified women were disproportionately excluded by failure to retain applications for some reasonable period of time. The impact proof would be difficult, but a plaintiff should not be foreclosed from presenting it.[94] The time-of-application

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91. *See also* United States v. Sheet Metal Workers Int'l Ass'n, Local 36, 416 F.2d 123 (8th Cir. 1969).

92. *See* Wilmore v. City of Wilmington, 699 F.2d 667, 668–69 (3rd Cir. 1983).

93. *See supra* text accompanying notes 32–38.

94. Recall that in the Skytrans hypothetical, as in *Furnco*, the employer's work force did not show underrepresentation of the plaintiff's group compared with the relevant population. An attack of the recruitment procedure is then based upon the assumption that, absent discriminatory recruiting, members of plaintiff's group would be interested and qualified for this work at a level higher than their representation in the relevant labor market. For cases in which similar arguments have been made, see EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980); Davis v. City of Dallas, 483 F. Supp. 54 (N.D. Tex. 1979), *motion to reconsider denied with opinion*, 487 F. Supp. 389 (N.D. Tex. 1980). Recall also that Skytrans can defend by showing the validation of its employment requirements. The underrepresentation of plaintiff's group is not unlawful when it results from valid selection criteria. *See* Albemarle Paper Co. v. Moody, 422 U.S. 405

restriction is an employment requirement like any other qualification and therefore should be subject to Title VII analysis.

IV. Aggregated Recruitment Practices: The Bottom Line Defense

Is any disparate impact of recruitment practices unimportant if the "bottom line" of recent hirees compares favorably with the relevant labor market? Is all this fuss about recruitment irrelevant as long as the employer has a representative work force? The premise of this Article is that restrictive recruitment practices are specific employment requirements. Therefore, the bottom line should not be a defense. Following the Supreme Court's 1982 decision in *Connecticut v. Teal*,[95] the bottom line is not a defense in cases where an unvalidated hiring requirement has an impact.[96] It is not sufficient for one requirement to offset another to create a representative work force. The Court reasoned that Title VII protects individuals from exclusionary practices that are not justified by business necessity.[97] Individuals rather than groups are protected by the Act.[98]

In the recruitment context, restrictive and unrestrictive practices must again be distinguished. Restrictive recruitment practices are equivalent to requirements; unrestricted practices are not. When an employer recruits restrictively, applicants are not considered unless they have come from an approved source or have not come from an unapproved source. Unrestricted recruiting, on the other hand, is an employer's willingness to accept applicants from all sources. Such recruiting can be both active and passive. The employer may make special efforts to attract workers, but also accept self-referrals. A favorable bottom line should be a defense for unrestricted recruiting because no single practice is an employment requirement. The adverse effect of any one practice may be offset by another. Conversely, restrictive practices may permanently exclude individuals unfairly because the employer will not consider applications made at some times or through some channels.[99] The burden on the employer should then be to establish business necessity.

(1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Therefore the plaintiff would want to challenge the restrictive recruitment practice separately.

95. 457 U.S. 440 (1982).

96. *Id.* at 442–45.

97. *Id.* at 453–54.

98. *See also* Wilmore v. City of Wilmington, 699 F.2d 667 (3d Cir. 1983) (without discriminatory assignments precluding administrative experience, minorities would have fared even better because of superior group performance at oral interview). *See also supra* note 13.

99. *See* Greenspan v. Automobile Club of Mich., 495 F. Supp. 1021 (E.D. Mich. 1980). Compare the unusual requirement in EEOC v. Greyhound Lines, Inc., 635 F.2d 188 (3d Cir. 1980). Plaintiff challenged the employer bus company's rule prohibiting facial hair as discriminatory against blacks. There was no direct proof that such a policy adversely affects blacks; the only proof was that black males disproportionately suffer from a skin disease requiring them to grow beards. The court relied upon the fact that blacks were well represented in the company compared with the relevant labor market. The dissent objected to the bottom line approach and noted that it "would establish by judicial fiat an invidious quota defense." 635 F.2d 188, 196–97 (Sloviter, J., dissenting). This case, which preceded *Teal*, appears to be accepting a bottom line defense.

V. Business Necessity for Restrictive Recruiting

In *Furnco* the district court found that the employer's refusal to hire at the gate had a legitimate business purpose, thus answering the plaintiff's disparate treatment claim under *McDonnell Douglas*.[100] That purpose was the necessity of insuring that only highly qualified and experienced bricklayers were on the job to avoid shoddy or slow work. The risk of future maintenance costs, damage to Furnco's reputation for poor work, and safety hazards were also cited. The court of appeals reversed because the employer could have adopted other reasonable procedures to accept applicants while meeting these goals.[101] The Supreme Court reversed the court of appeals and said the court had gone too far in substituting its own business judgment for that of the employer.[102] The Supreme Court opinion emphasized the proper burdens in a disparate treatment type of case.[103]

A disparate impact type of case, however, requires a different defense. A prima facie case of disproportionate exclusion triggers the *Griggs* requirement that the employer demonstrate the business necessity for the exclusionary practice. In cases concerning selection criteria such as tests or height requirements, the employer's burden is to show the job-relatedness of each selection criterion.[104] For other types of employment conditions, such as restrictive recruitment, the nature of the required proof is less clear.

The line of cases concerning garnishment discharge rules provides some insight into the business necessity defense for employment conditions unrelated to selection. In *Johnson v. Pike Corp. of America*,[105] the employer had a policy of discharging employees whose wages had been garnished. The plaintiff established that the policy had a disparate impact on the basis of race. The employer cited expense and inconvenience as its business necessity for the rule, but the district court rejected these grounds. The opinion limited the business necessity defense to job-relatedness and concluded that there is "no room for arguments regarding inconvenience, annoyance or even expense to the employer."[106] Another garnishment discharge case, *Wallace v. Debron Corp.*,[107] did not limit the concept of business necessity to job-relatedness as completely as the *Johnson* opinion. In *Wallace* the Eighth Circuit tied the concept of business necessity to "employee productivity."[108]

Applying these concepts to other employment practices not related to selection of applicants, such as restrictive recruitment, is difficult. If business necessity requires a showing of job-relatedness, prohibitory recruitment requirements would be virtually incapable of meeting the standard. The refusal to accept applications from

100. Waters v. Furnco Constr. Corp., 13 Fair Empl. Prac. Cas. (BNA) 1020, 1024 (N.D. Ill. 1975).

101. Waters v. Furnco Constr. Corp., 551 F.2d 1085, 1088–89 (1977).

102. Furnco Constr. Corp. v. Waters, 438 U.S. 567, 569–74 (1978).

103. *See supra* notes 64 and 65 and accompanying text.

104. On the difference between job-relatedness and business necessity, see generally Federal Statutory Law, *supra* note 89, at 53–56.

105. 332 F. Supp. 490 (C.D. Cal. 1971).

106. *Id.* at 495.

107. 494 F.2d 674 (8th Cir. 1974).

108. *Id.* at 677.

a specific source, such as refusing to hire walk-ins, would usually be based upon considerations of expense or annoyance. Single source recruiting may often be justified as job-related, however, because such recruitment is frequently a form of experience requirement.[109] If, for example, WREC-TV could show that experience with WREC radio was a unique background that directly related to a worker's ability to do a job with WREC-TV, then the recruitment requirement would be justified as job-related.

A less stringent interpretation of the business necessity defense would make other restrictive recruitment practices defensible. One early case identified factors such as whether the challenged practice effectively carries out its purported purpose, and whether the same function could be accomplished with a practice having a lesser impact.[110] These factors resemble the ones considered by the court of appeals in *Furnco*. The Supreme Court rejected them in the context of showing legitimate business purpose in rebuttal of an inference of intentional discrimination, but did not discuss them in the context of business necessity.

Furnco does make clear, however, that Title VII does not impose a duty on employers to engage in active recruitment of minorities in the absence of a finding of prior unlawful conduct. This analysis is consistent with prior case law holding that an employer need not undertake a training program for minorities to offset the exclusionary effect of an experience requirement.[111] At that level, cost and inconvenience do become a defense.

A reasonable application of the business necessity defense for recruitment practices would need to be broader than the job-relatedness standard. Cost should not be disregarded in this context. Consider, for example, a small employer, Company *Q*, which processes very few applications per year and does not accept unsolicited applications. Instead, Company *Q* only takes referrals from one employment agency. Under the model proposed in this Article, a plaintiff should be able to establish a prima facie case under Title VII if this restrictive recruitment practice has a disparate impact on a group protected by the Act. It would not be sufficient for the employer to rebut by showing a representative work force accomplished through a supplemental affirmative action plan, nor would it be sufficient for the employer to defend by demonstrating the job-relatedness of the selection criteria. Company *Q* would argue that the cost of accepting unsolicited applications would be prohibitive, possibly requiring additional personnel and office space. For a very large employer who processes hundreds of applications a year, the additional cost of open recruiting may also be great, but not a large percentage increase in the overall cost of processing applications.

Cost and convenience should be factors considered in the application of the business necessity defense to recruitment practices. The cost factor should be a

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109. One such form is single source recruiting from apprenticeship programs. If admission to such training is exclusionary, then the source of workers will reflect that effect. *See, e.g.*, Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local 396, 637 F.2d 506 (8th Cir. 1980).

110. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971), *cert. dismissed*, 404 U.S. 1006 (1971).

111. *See* United States v. Sheet Metal Workers Int'l Ass'n, Local 36, 416 F.2d 123 (8th Cir. 1969).

relative concept, such as the projected percentage increase in the employer's cost of recruitment and selection. Equally relevant, however, should be the absolute expense of processing each application in terms of applying the selection criteria. Consider the employer who has responded to employment discrimination law by adopting sophisticated testing procedures, such as a job simulation experience, to establish criteria that validly predict job performance. The absolute cost of processing each applicant may then be high, and therefore a percentage increase approach to evaluating the employer's projected increased cost of open recruiting may be unjustified. Another factor that might reasonably be considered would be the magnitude of the impact of the recruitment practice compared with the cost of open recruiting. Cost and inconvenience should not automatically satisfy the business necessity defense, but they should not be totally disregarded.

A liberal application of the business necessity defense is more justified for recruitment practices than for selection criteria. Validation is not a meaningful concept for recruitment except for practices that operate as experience requirements. Otherwise, the function of recruitment practices is not to predict job performance but to communicate and attract prospective employees. A rational employer considers the prediction of job performance when establishing selection procedures; the same rational employer considers expense, convenience, and effectiveness in attracting qualified candidates when establishing recruitment practices. The business necessity defense should reflect these separate functions. Cost, inconvenience, and the availability of alternative effective recruitment methods should all be relevant factors for the defense.

VI. Conclusion

Recruitment practices should be analyzed as separate components of selection procedures under employment discrimination law. Some cases have already recognized that intentional exclusion through recruitment can be a violation of Title VII, but plaintiffs should not be required to demonstrate intent in all cases. Courts should recognize that restrictive recruitment practices are hiring requirements. Accordingly, they should be subject to the same analysis as other hiring requirements. If the restrictive practice has a disparate impact, the employer should show business necessity. The bottom line defense should not be available for restrictive recruitment practices in the aggregate just as it is not available for selection practices. This Article has argued that the business necessity defense should be broadly construed for recruitment practices. Cost, inconvenience, and the availability of other effective recruitment procedures should all be relevant to the defense.

This Article urges recognition of the distinction between restrictive and unrestrictive recruitment practices. Although restricted recruiting amounts to an employment requirement, unrestricted recruiting does not. Unrestricted practices, both active and passive, should not be subject to disparate impact analysis. Employers who accept and consider all applications from whatever source have no requirement that applicants come from particular sources. No individual is automat-

ically foreclosed. Even though some active recruitment may have an impact, such as interviewing at schools with identifiable racial character, that impact should not shift the burden to the defendant to show business necessity. All unrestricted recruitment practices in the aggregate make the applicant pool. In such cases the entire recruitment and selection procedure can be analyzed together. If intentional discrimination motivated the employer to engage in some active recruitment, however, then the burden should shift to show a defense such as a bona fide affirmative action plan. Absent impermissible intent to exclude, employers should be free to engage in active and passive recruiting as long as they remain willing to accept and consider all applications from all sources.

The case law in this area of employment discrimination needs clarification. The Ninth Circuit has expressed uncertainty as to whether intent must be shown in recruitment cases.[112] The Supreme Court did not analyze *Furnco Construction Co. v. Waters*[113] as a recruitment case because it developed the posture of a hiring case. Future cases should distinguish recruitment from hiring. The purpose of Title VII, as articulated in *Griggs v. Duke Power Co.*,[114] compels that recruitment methods be recognized as separate employment practices. When those practices are restrictive so that the source of an application determines whether the individual is considered for employment, they can operate as "built-in headwinds" that deny equal opportunity in employment.[115] Absent a business necessity for a restrictive recruitment practice that is exclusionary, it should be a violation of the Act regardless of the employer's good faith or the character of the employer's work force.

112. *See supra* notes 9–13 and accompanying text.
113. 438 U.S. 567 (1978).
114. 401 U.S. 424 (1971).
115. *Id.* at 432.